

UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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APPEAL NO. 19-10651-A

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DARREN MICKELL,  
*Plaintiff/Appellant*

v.

BERT BELL / PETE ROZELLE NFL PLAYERS RETIREMENT PLAN  
*Defendant/Appellee.*

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On Appeal from the United States District Court  
for the Southern District of Florida

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INITIAL BRIEF OF APPELLANT DARREN MICKELL

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Case No. 19-10651-A  
*Darren Mickell v. Bert Bell / Pete Rozelle NFL Players Retirement Plan*

**CERTIFICATE OF INTERESTED PERSONS**  
**AND CORPORATION DISCLOSURE STATEMENT**

Pursuant to Eleventh Circuit Rule 26.1-1, Plaintiff-Appellant Darren Mickell hereby discloses the following:

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Cohn, James I. (District Judge)

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Dated: May 6, 2019

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## STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiff/Appellant Darren Mickell (“Mickell”) submits this Court should hear oral argument because the District Court departed from the Department of Labor ERISA claim regulations as well as Eleventh Circuit precedent requiring Defendant/Appellee Bert Bell/Pete Rozelle NFL Player Retirement Plan (“the Plan”) to provide Mickell with a “full and fair” review of his disability benefits claim, weighing all available evidence. *See* 29 C.F.R. 2560.503-1; *Oliver v. Coca Cola Co.*, 497 F.3d 1181, 1199 (11th Cir. 2007), *reh'g granted, opinion vacated in part*, 506 F.3d 1316 (11th Cir. 2007), and *adhered to in part on reh'g sub nom. Oliver v. Coca-Cola Co.*, 546 F.3d 1353 (11th Cir. 2008).

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## STATEMENT OF JURISDICTION

Mickell initiated this action pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (“ERISA”), alleging that the Plan improperly denied his claim for Inactive A Total & Permanent Disability (“Disability” or “Disabled”) benefits. The District Court had jurisdiction under 29 U.S.C. § 1132(f), after Mickell exhausted his administrative appeals. On January 15, 2019, United States District Court Judge John I. Cohn issued an Order on Parties Dispositive Motions, granting the Plan’s Motion for Judgment on the Administrative Record (“MJ”) and denying Mickell’s Motion for Summary Judgment (“MSJ”). (Doc. 60).<sup>1</sup> A Final Judgment in favor of the Plan was entered on January 15, 2019. ( Doc. 61).

On February 14, 2019, Plaintiff timely filed a notice of appeal. ( Doc. 62).

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<sup>1</sup> Throughout this brief, “(Doc, #)” will refer to the corresponding document on the District Court Docket Sheet. Citations to the purported claim file filed by the Plan as (Doc. 52-1 - 52-10), begin with “A-” followed by the Plan’s bate stamp number.

## **STATEMENT OF THE ISSUE**

As an ERISA fiduciary, the Plan was required to fully and fairly evaluate Mickell's claim for benefits during the review process. A full and fair review required the Plan to construe Plan terms according to their plain meaning, avoiding interpretations that would render some language meaningless. A full and fair review also required the Plan to consider all available evidence, as opposed to automatically deferring to its hired evaluators' employability conclusions and disregarding all evidence proffered by Mickell. A full and fair review further obligated the Plan to consider the cumulative effect of all of Mickell's conditions on his ability to meet the definition of Disability, rather than evaluating each condition in a silo. The issue is whether the District Court erred in finding that the Plan did not act arbitrarily and capriciously in rendering its claim decision where the Plan's interpretation of the Disability provision is contrary to how an ordinary person would read it and renders the "up to \$30,000 per year" earnings qualifier contained in the definition meaningless; the Plan automatically adopted the employability conclusions of its hired evaluators to the exclusion of all evidence submitted by Mickell; and the Plan failed to consider the combined effect of all of Mickell's conditions on his ability to meet the definition of Disability?

## **STATEMENT OF THE CASE**

This is a case for recovery of Disability benefits under ERISA. After suffering repeated orthopedic injuries and multiple traumatic brain injuries during his nine seasons as a defensive end in the National Football League (“NFL”), Mickell was ultimately left Disabled since December 2012. The Plan denied Mickell’s claim for Disability benefits, initially asserting that he was employed and subsequently alleging that he did not meet the definition of Disability.

Mickell is a participant in an ERISA governed employee welfare benefit plan administered by the Plan. Mickell brought suit asserting that the Plan was wrong and unreasonable in denying his claim for Disability benefits.

During the litigation, Mickell was awaiting a Social Security disability benefits hearing. Thus, on April 7, 2016, the parties filed a Joint Motion to Stay the Proceedings explaining to the District Court: “Should Plaintiff receive a favorable disability determination by the Social Security Administration [(“SSA”)], the parties agree that this would be dispositive of a material aspect of the claims asserted by Plaintiff in this litigation.” (Doc. 21, ¶¶1-2). Accordingly, the court stayed the proceedings. (Doc. 22). In November 2017, the administrative law judge determined that Mickell has been unable to engage in gainful employment since December 15, 2012, due to a severe neurocognitive

disorder, providing “as the direct result of traumatic brain injuries sustained while playing professional football”:

The severity of the claimant’s impairments meet the criteria of section 12.02. The “paragraph A” criteria are satisfied because the claimant has perceptual or thought disturbance, mood disturbance, and emotional lability and poor impulse control. The “paragraph V” criteria are satisfied because the claimant’s impairments cause a marked limitation in understanding, remembering, or applying information, a moderate limitation in interacting with others, an extreme limitation in concentrating, persisting, or maintaining pace, and a moderate limitation in adapting or managing oneself.

(Doc. 22, Exh. A, p. 6 of 7). Mickell issued a notice to the Court informing it of the SSA award and sent it to the Plan. Despite not submitting a new application, the Plan considered the SSA award as a new application and found Mickell eligible for Inactive B benefits (rather than the more lucrative Inactive A benefits), alleging that the application was submitted after fifteen years of Mickell’s last credit season.

This is an appeal from the District Court’s grant of the Plan’s MJ and denial of Mickell’s MSJ.

## **Statement of the Facts**

### **A. The Plan**

Professional football often takes a formidable toll on players. Retirees from the NFL frequently live with chronic and disabling pain due to back, shoulder,

hip, knee, ankle, hand, and leg injuries. Brain injuries are just as common and often leave retirees with chronic headaches, impairments in cognition, emotional dysregulation, depression, and anxiety. According to the NFL's internal estimates, almost one third of retired NFL players will develop long-term and pervasive cognitive problems, which are likely to emerge at significantly younger ages than in the general population.<sup>2</sup> NFL Players who become Disabled by orthopedic and/or brain injuries that are the result of professional football, and are therefore unable to work, are entitled to well-defined benefits. A-27.

As a former player in the NFL, Mickell was an eligible participant of the Plan. (Doc. 10 ¶ 8). Accordingly to Section 5.2(a) of the Plan, a Player is eligible for Disability benefits if:

(1) [] he has become totally disabled to the extent that he is substantially prevented from or substantially unable to engage in any occupation or employment for remuneration or profit, but expressly excluding any disability suffered while in the military service of any country, and (2) that condition is permanent. The educational level and prior training of a Player will not be considered in determining whether such Player is "unable to engage in any occupation or employment for remuneration or profit." **A Player will not be considered to be able to engage in any occupation or employment for remuneration or profit** within the meaning of this Section 5.2 merely because such person is employed by the League or an Employer, manages personal or family investments, is employed by or associated with a charitable organization, is employed

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<sup>2</sup> See Report of the Segal Group to Special Master Perry Golkin, *In re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323 (AB), MDL No. 2323 (E.D. Pa.), Doc. 6168 (Sept. 12, 2014) (the "*Concussion Litigation*").

out of benevolence, or **receives up to \$30,000 per year in earned income.**

A-27 (emphasis supplied). Section 5.2(b) provides that an eligible Player:

who has been determined by the Social Security Administration to be eligible for disability benefits under the Social Security Disability program or Supplemental Social Security Income program, and who is still receiving such benefits at the time he applies, will be deemed to be totally and permanently disabled....

A-27.

## **B. Claim History**

Mickell dedicated nine years to the NFL (1991-2001) in one of the most physically demanding positions, defensive end, for Kanas City, New Orleans, San Diego, and Oakland. A-184. In fact, according to an NFL study, Mickell's position "tend[s] to experience a greater overall frequency of impacts than speed positions and have the greatest proportion of impacts to the front of the helmet."<sup>3</sup> During his long career in the NFL, Mickell sustained recurrent high speed contact hits, resulting in multiple orthopedic injuries to his back, ribs, shoulders, arms, hands, knees, hips, legs, and feet requiring surgeries on both shoulders and both knees, he had to have his hip drained multiple times, and was given

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<sup>3</sup> See Michael D. Clark, Eleanna M. L. Varangis, Allen A. Champagne, Kelly S. Giovanello, Feng Shi, Zachary Y. Kerr, J. Keith Smith, Kevin M. Guskiewicz, *Effects of Career Duration, Concussion History, and Playing Position on White Matter Microstructure and Functional Neural Recruitment in Former College and professional Football Athletes*, *Radiology*, Oct. 31, 2017, available at <https://pubs.rsna.org/doi/full/10.1148/radiol.2017170539>.

numerous medications and frequent injections to keep him in the game. A-220-24. Further, Mickell sustained multiple “blows to the head” in which he would feel cognitively affected, have trouble answering questions, and would have to sit out plays. A-254. Overtime, Mickell’s chronic back, shoulder, and knee pain and frequent headaches were unrelenting and ultimately in 2001, ended his career in the NFL. A-221; 256; 264. After his retirement, Mickell owned a small business supplying video games to vendors, which ended shortly after it was started. A-1349. Mickell remained plagued by constant headaches and pain and was left unable to maintain employment. A-221; 264.

In April of 2012, Mickell attempted to work as a freight handler. A-256; 221; 1058. However, Mickell’s condition substantially interfered with his ability to do his job, he could not keep up, and often had to miss work or leave early. A-256; 221. Accordingly, he was placed on a limited schedule, but despite his best efforts, Mickell could not perform his duties given his constant pain, headaches, and cognitive impairments and ultimately had to cease work. A-256; 221; 1058.

In June 2013 Mickell contacted the Plan and requested an application for Disability benefits, which was completed on July 12, 2013. A-92-95. In a correspondence dated August 19, 2013, the Plan requested a letter from Mickell’s employer regarding his “employment activities” without inquiring about Mickell’s annual salary or requesting any medical documentation. A-97.

Mickell submitted the requested letter from his employer dated September 4, 2013 and provided income information and his tax returns establishing that he earned less than \$30,000 annually. A-99-105. On September 27, 2013, the Plan denied Mickell's application, alleging that Mickell was "currently employed" and his "employment [was] not associated with the League or an Employer, personal or family investments, a charitable organization, or out of benevolence," failing to acknowledge that Mickell was not able to "receive[] up to \$30,000 per year in earned income." A-112-13.

Mickell obtained legal representation, who ordered the extensive medical documentation regarding Mickell's conditions and began communicating with the Plan. A-119-21. Subsequently, the Plan alleged that it "reversed" its "initial denial to the extent that the denial was based on Mr. Mickell's employment" and was assessing his claim for Disability benefits. (Doc.52,p.5).

On June 17, 2014, Mickell provided the Plan with medical records detailing his injuries, surgeries, and diagnostic test results, as well as an independent functional capacity evaluation ("FCE")<sup>4</sup> report and an independent neuropsychological evaluation report. A-184-242, 244-251; 252-266; 271-531;

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<sup>4</sup> An FCE is defined as a comprehensive medical assessment of an individual's safe functional tolerances and physical limitations relative to work activities. *See Guide to the Evaluation of Functional Ability*, American Medical Association. 2009. According to the American Medical Association, functional testing is more objective than the current use of restrictions estimated by physicians. *See id.*

534-68, 570-650, 653-760, 780-855. The Plan unilaterally scheduled an evaluation with its hired orthopaedist, Chaim Arlosoroff, on June 17, 2014 and informed Mickell that it sent his medical records to the evaluator. A-169. Mickell's attorneys requested that the medical support they submitted be provided to the Plan's evaluators prior to rendering their decisions. A-176; 870. However, the Plan failed to send any records to Arlosoroff on the day of or any time after the evaluation, so that Arlosoroff could review the information before he prepared his report.

The Plan also required Mickell to undergo examinations by neurologist, Barry McCasland (A-886-894) and neuro-psychologist, Stephen Macciocchi (A-895-908). On September 8, 2014 the Plan issued another denial letter, and the sole rationale cited was its claim that its hired evaluators, Arlosoroff, McCasland, and Macciocchi, found Mickell "employable." A-916-17. The Plan made no mention of any evidence submitted by Mickell that it considered in rendering its claim decision.

On March 9, 2015, Mickell appealed the Plan's denial of benefits, submitting information establishing Mickell's Disability under the Plan. A-934-1173. The Plan required Mickell to submit to four additional examinations with evaluators it hired: orthopaedist, George H. Canizares (A-1252-58), neurologist, Peter Dunne (A-1224-27), and neuro-psychologist, Sutapa Ford. (A-1263-72).

Ford reported that Mickell's "psychological testing revealed major depression and significant anxiety" A-1268. Ford explained that "[m]ore significant to [Mickell's] functional capacity" was his "psychiatric dysfunction" and thus, recommended that "Mickell undergo a thorough psychiatric assessment which includes validity testing and [a] formal assessment of response biases." A-1268. The Plan did not heed Ford's recommendation. Instead, it hired psychiatrist, Raymond Faber, to conduct an interview of Mickell, who did not review any documents, perform any testing, or interview any third parties. A-1346-51. However, Mickell previously submitted to an independent psychological evaluation by clinical psychologist, Peggy Vermont, which included the recommended testing and submitted it to the Plan. A-1339-42. Ms. Vermont found that:

[b]ased on his history, psychological testing, current interview, and outside records, it appears that Mr. Mickell is suffering from significant mental health symptoms that are impeding his social, emotional, and occupational functioning. Due the severity of his mood and anxiety symptoms, Mr. Mickell is not deemed employable at this time.

A-1341. Faber failed to list that he reviewed Ms. Vermont's report or any other records in rendering his employability conclusion. A-1345-51.

In a letter dated August 27, 2015, Defendant upheld its denial, alleging that it reached its adverse benefit determination "despite potentially conflicting

medical evidence,” failing to provide any true analysis of the evidence submitted by Mickell or explain its disagreement with the evidence. A-1373. Next, the Plan asserted that it was free to discount all of the evidence submitted by Mickell in favor of its evaluators’ opinions. *See id.* The Plan first dismissed all of Mickell’s records that do “not directly address the issue of whether [Mickell] is able to work,” in favor of “other evidence that did directly address the issue.” *Id.* The evidence ignored includes Mickell’s MRI reports, x-rays reports, hospital records, injury reports, and treating physicians’ records. However, the Plan then asserted that “as for the evidence [submitted by Mickell] that did directly address the issue of whether [Mickell] is able to work,” the Plan “had more confidence in the reports of the Plan’s neutral evaluators,” explaining that the Plan “uniformly accept[s] and relie[s] on” its evaluator’s opinions in rendering Disability benefit determinations. *Id.* (emphasis supplied).

### **C. Mickell is Disabled.**

On April 5, 2014, Mickell underwent an MRI of his right and left knees showing a grade II strain of the distal biceps femoris muscle and tendon of the left knee; bilateral patellofemoral compartment osteoarthritic changes; bilateral medial and lateral compartment osteoarthritic changes; and bilateral knee effusion. A-179; 181. An April 12, 2014 MRI of Mickell’s cervical spine revealed a C5-6 central disc herniation which impinges upon his thecal sac,

narrowing the central canal; a C6-7 central disc herniation which impinges upon thecal sac, narrowing the central canal; a straightening of the normal cervical lordotic curve; a C2-3 and C3-4 early disc desiccation; and a C4-5 early degenerative change with a small disc/osteophyte bulge. A-177. The MRI of his lumbar spine taken the same day revealed a L4-5 central broad-based disc herniation which impinges upon the anterior thecal sac, narrowing the neural foramina bilaterally; a L5-S1 central broad-based disc herniation which impinges upon the anterior thecal sac, narrowing the neural foramina bilaterally; and an annular tear. A-178.

On March 31, 2014, Mickell underwent an independent physical examination, FCE, comprehensive records review, and AMA impairment rating assessment by Board Certified Physical Medicine & Rehabilitation Specialist, Dr. Craig Litchblau. A-182-242. Dr. Litchblau's neuropsychological assessment revealed that Mr. Mickell has "[c]oordination problems, memory changes, dizziness, and emotional disturbance." A-187. A psychiatric assessment was also performed and while Mickell was able to instantly recall 2 out of 3 objects, he was able to recall "0 out of 3 objects in five minutes [and he] had difficulty and had to stop because he had wrong answers performing serial subtractions of 7 starting with 100." *See id.*

Based on the objective FCE test findings, physical examination, medical records review, patient and witness interviews, and cognitive and psychological assessments, Dr. Litchblau opined that Mickell suffered from:

- “Cervical and lumbar myofascial pain;”
- “Probable traumatic brain injuries with subsequent chronic posttraumatic headaches and cognitive deficits;”
- “Bilateral shoulder myofascial pain;”
- “Left hip myofascial pain;” and
- “Acute functional decline secondary to chronic pain [and] depression....”

A-222-25. Dr. Litchblau further opined:

[Mickell] is going to suffer from acute, intermittent exacerbations of chronic pain and discomfort and, when he experiences these acute, intermittent exacerbations of pain and discomfort, he will have good days, bad days, and missed days of work.... It is my medical opinion, as a Board Certified Psychiatrist, this patient will be unable to maintain gainful employment in the competitive open labor market or in a sheltered environment with a benevolent employer, secondary to acute, intermittent exacerbations of chronic pain.

A-226.

Mickell also underwent a comprehensive independent neuropsychological evaluation with neuropsychologist, Dr. Mark Todd. In order to reduce the effects of Mickell’s chronic pain, depression, and anxiety on the reliability of the testing,

Dr. Todd determined that the neuropsychological examination should take place in three sessions, with over a week in between each portion of the test. A-252-66. Dr. Todd performed neuropsychological testing, a comprehensive medical records review, and patient and witness interviews.

“[O]n a task requiring [Mickell] to perceptually reorganize objects, which have been cut up and rearranged, his performance was only 21 out of 30, which is clearly less than expected.” A-262. Learning and memory tests were also performed and “on a 2<sup>nd</sup> rote learning word paired association task,” Mickell became “especially frustrated on this task” and thus, the test had to be discontinued,” which indicated “less than expected performance.” *Id.* Dr. Todd also noted that Mickell’s scores on a short-term recall memory test “clearly reflect[ed] loss of information over the delay.” *Id.* Dr. Todd explained that on a visual memory test, Mickell’s scores evidenced a “marked loss of information over the delay.” *Id.* Further, Dr. Todd explained that validity testing was performed, indicating that Mickell’s scores were “well within normal limits (forced choice = 18/21) and (free recall = 7/21),” were consistent with his clinical observations, and indicated that Mickell “put forth his best effort.” A-263. Dr. Todd opined that Mickell’s:

neuropsychological profile appears to provide evidence of a mild cognitive disorder. He clearly has less than expected memory for visual information as well as problems with rote verbal learning. He

may have some slightly less than expected cognitive efficiency with mild slowing and perhaps some mild difficulties with visual perceptual analysis.

A-265. Dr. Todd also provided:

Certainly, his mood symptoms are a prominent problem that could contribute to and may even account for his difficulties. The concern would be, however, that his problems may also be more reflective of a significant cognitive disorder related to a potential history of multiple concussive injuries.<sup>5</sup> Certainly, given his history of ongoing depression with some behavioral dyscontrol as well as cognitive complaints, there are concerns that his current difficulties may represent a more significant issue.

*Id.* Dr. Todd concluded that Mickell's "mood and behavior together with his physical problems and cognitive difficulties make competitive employment at this

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<sup>5</sup> Head trauma or traumatic brain injury ("TBI") can cause cognitive impairments and emotional deregulation, depression, and anxiety. *See* Tessa Hart, PhD and Keith Cicerone, PhD, *Model Systems Knowledge Translation Center, Emotional Problems after Traumatic Brain Injury*, Brainline, Nov. 28, 2017, available at <https://www.brainline.org/article/emotional-problems-after-traumatic-brain-injury>. "Chronic traumatic encephalopathy (CTE) is a neurodegenerative disease thought to be associated with a history of repetitive head impacts." Baugh, *et al.*, *Current Understanding of Chronic Traumatic Encephalopathy*, 16 *Current Treat. Options Neurol.* 306 (2014) available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4255271/>. A definitive diagnosis of CTE can only be made post-mortem. *See id.* However, the available evidence suggests that CTE presents clinically with mood, behavior, and cognitive dysfunction including, memory impairments, impairments in executive function, depression, irritability, mood swings, emotional lability, impulsivity, explosivity, anxiety, and aggression. *See id.* CTE is progressive and symptoms become more extreme with time. *See id.* Symptoms usually present with mood and emotional dysregulation and progress to significant cognitive impairments. *See id.*

point quite difficult.... Unfortunately, these variables are likely to prohibit him from consistently attending work or completing work requirements.” *Id.*

On June 10, 2015, Mickell underwent an independent comprehensive psychological assessment with psychologist, Peggy Vermont, which included a detailed records review (including the Plan’s evaluators’ reports), psychological history and systems assessment, psychological testing, response bias analysis, and validity testing. A-1330-42. Ms. Vermont reported that Mickell suffers from frequent and “significant panic attacks,” has “difficulties focusing” and “his anxiety and rumination occur all day and are so disruptive that it is hard for him to keep his concentration.” It was also reported that Mickell has “nightmares of people chasing him or killing somebody or feeling trapped,” experiences “irritability, anger, suicidal/homicidal thoughts without intent,” becomes “extremely agitated or ‘aggravated,’ and has “violent thoughts of ‘hurting somebody’ or ‘crazy thoughts like seeing [him]self shot.’” A-1334. Further, Ms. Vermont explained that Mickell is nervous around people and has become “more emotionally detached from others and does not get pleasure from any of the activities” he enjoyed in the past. *Id.*

Likewise, Ms. Vermont reviewed a statement from Mickell’s mother and noted:

she moved in with her son to help him with the bills around the house as he was neglecting his responsibilities. She stated that Mr.

Mickell is often forgetful, complains of headaches, and has distanced himself from friends, family, and his children. She stated that Mr. Mickell stays isolated in his room and often wakes up in the middle of the night to go outside due to nightmares. Finally, she reported that Mr. Mickell has issues with his temper and was concerned he might hurt himself or someone else.

*Id.* She also separately interviewed Mickell's girlfriend of eleven years, Nakeisha Hendricks. A-1335. Ms. Hendricks stated that Mickell suffers from "constant pain, headaches, and mood changes." *Id.* "He does not sleep, has to be reminded of short term events, [] is often depressed and angry that he is forgetful," and has "daily mood swings." *Id.* Moreover, "[s]he fears the possibility of him becoming violent" and asserted that he "lacks ration or reason." *Id.* Ms. Hendricks stated that Mickell's condition has "decline[d] over the past several years," "he is often angry especially when he does not remember something," "he does not interact with her or the children," "his appetite and weight changes with his moods," "he needs someone with him on a daily basis or he will stay in bed refusing to do anything for himself," and "he is a different person day to day." *Id.* Ms. Hendricks also reported that Mickell "could not handle his responsibilities at his [past] employment and would often come home frustrated because he could not do what was expected of him." A-1335-36.

Ms. Vermont administered the Millon Clinical Multiaxial Inventory III, which revealed that Mickell suffers from "a significant mood disorder" and "a significant anxiety disorder," resulting in "behavioral edginess, apprehensiveness

over small matters, worrisome self doubts, fatigue, insomnia, headaches, [] an inability to concentrate,” “outbursts of anger, panic attacks, exaggerated startle response, and feelings of detachment.” A-1338-39.

Mickell took the Beck Depression Inventory-11, which indicated that he is experiencing “significant depressive symptoms,” “feels sad much of the time, he feels his future is hopeless and will only get worse,” and has “thoughts of killing himself,” “cries more than he used to,” “has difficulty making decisions,” “does not have energy,” feels irritated and agitated, and has difficulty becoming interested in things. A-1339.

Mickell’s scores on the Conners' Adult ADED Rating Scale indicated that he suffers from inattention and memory problems, ADHD symptoms, and problems with self concept. A-1340. It was reported that Mickell “doesn’t plan ahead, blurts things out, loses things necessary for tasks,” acts “without thinking,” it is “hard [for him] to keep track of several things at once, [he] forgets to remember things, has a short temper, has trouble keeping his focus,” “is easily set off,” “is irritable, “has problems organizing tasks, and is distracted by things going on around him.” *Id.*

Ms. Vermont also administered validity testing, the Structured Interview of Malingered Symptomatology (SIMS). A-1340. His scores were not elevated, establishing that Mickell was not malingering. *Id.*

Based on her comprehensive assessment and testing, Ms. Vermont opined that Mickell suffers from an “[u]nspecified [d]epressive [d]isorder 300.02,” “[g]eneralized [a]nxiety [d]isorder;” “[m]ild [n]eurocognitive [d]isorder, [u]nspecified;” and noted that “[t]raumatic [b]rain [i]njury” should be considered.

*Id.* Ms. Vermont concluded as follows:

Based on his history, psychological testing, current interview, and outside records, it appears that Mr. Mickell is suffering from significant mental health symptoms that are impeding his social, emotional, and occupational functioning. Due the severity of his mood and anxiety symptoms, Mr. Mickell is not deemed employable at this time.

A-1341. Ms. Vermont explained that Mickell could see some improvement with psychiatric medicine management, but “there is a high likelihood that medications may only ameliorate a small percentage of his most severe psychiatric symptoms” and they “may also cause significant side effects which may decrease Mr. Mickell's cognitive functioning.” *Id.* She also noted that therapy could also help, “but appears that it would have to [be] intense and long term in order to be beneficial.” *Id.* However, she explained that Mickell's “neurocognitive functioning may not show any improvement with medication or therapy as his neurological injuries are most likely due to ‘probable traumatic brain injuries.’” *Id.*

On July 29, 2015, Mickell was seen by his treating therapist, Rosa Gonzalez, who diagnosed him with severe depression and anxiety. A-1358. She indicated that “Darren presented with an overall depressed mood. He

was also visibly anxious and showed signs of stress, anxiety, and aggression.” *Id.* She further explained that Mickell’s short term memory appeared impaired, “possibly due to stress, depression and history of concussions,” “[h]is concentration level varied and he had a difficult time staying focused.” *Id.* Moreover, he admitted “feeling a great deal of aggression and anger.” *Id.* Ms. Gonzalez explained that:

Darren is desperate for help. His level of depression and anxiety is palpable and has had a negative impact on his relationships and ability to be productive. He is angry and frustrated by his problems and his inability to get better and move on with his life. At this time he lacks the ability to be a reliable and productive employee. Based on my review of the medical reports, my conversation with Dr. Nunez [psychiatrist], and my personal observation and clinical examination, it is my opinion that as the result of the cognitive and emotional impairments noted above, Mr. Mickell is unable to engage in any occupation.

A-1359.

**D. The Plan’s Denial of Disability Benefits Was Not Supported by Credible Substantial Evidence.**

On June 17, 2014, Mickell submitted to an examination by the Plan’s paid evaluator, Chaim Arlosoroff. The Plan did not provide Arlosoroff with any medical records to review on the day of or after the evaluation. A-1277. In a contemporaneous statement, Mickell explained that Arlosoroff’s examination of him lasted only a few minutes and his verbal history was equally as brief. A-1056. Arlosoroff did not perform any functional ability testing, such as an FCE. With no

medical records to review, no true medical history to assess, and an extremely brief physical examination, Arlosoroff concluded that Mickell was employable in light to moderate work with restrictions of no repetitive kneeling, squatting, and climbing and avoidance of heavy lifting over his shoulder. A-1279.

On August 19, 2014, Mickell submitted to an evaluation by the Plan's paid neurologist, Barry McCasland. A-886-94. McCasland did not perform any objective testing of Mickell's functional abilities, such as an FCE, and did not indicate that he had access to, reviewed, or considered Dr. Litchblau's FCE report. *See id.* Based on his brief examination, McCasland concluded that from a "neurological standpoint" there was not an indication that Mickell had limitations in his employability. A-887.

However, McCasland commented that Mickell explained that during his NFL career, he suffered "a concussion with loss of consciousness" on one occasion during practice and there were "too many [instances] to count" in which he "suffered a blow to the head that did not cause him to lose consciousness." A-888. It was reported that he began having headaches "about two or three years after beginning his football career." *Id.* McCasland reported that he administered the Montreal Cognitive Assessment and Mickell scored below average. A-890; 894. McCasland noted Mickell's cognitive impairments such as "prominent difficulties" with memory, forgetting where he is going while driving,

being incapable of paying his own bills (requiring his mother to manage his bills), and an inability to follow directions or to recall instructions immediately after hearing them. A-888. It was noted that Mickell also suffers from an inability to concentrate and word loss (often using the wrong word or being unable to come up with a word) and “zoning out” while watching television. It was reported that Mickell becomes impatient and “angers quickly.” *Id.* It was noted that Mickell explained that his symptoms caused difficulty in his last job, as he made “numerous mistakes.” *Id.*

McCasland objectively observed that Mickell was suffering from depression and opined that Mickell suffers from a “chronic headache disorder with mild headache burden,” “mild cognitive disorder,” and a “significant depression and anxiety disorder” which may account or contribute to his cognitive impairments. A-890; 892.

On August 20, 2014, Mickell submitted to a neuropsychological evaluation by an evaluator hired by the Plan, Stephen Macciocchi. Macciocchi administered neuropsychological tests which concluded the following:

- Attention-Concentration: impaired (74);
- Story memory performance: mildly-moderately impaired following a short delay (T=33) and moderately impaired following a long delay (T=22)

- Verbal learning over trials on the California Verbal Learning Test-II: low average (T=40);
- Short delayed spontaneous recall: impaired (T=35);
- MMPI-2- RF and BDI: consistent with severe depressive symptoms;
- Beck Anxiety Inventory: consistent with severe anxiety (30).

A-902.

Macciocchi also asserted that Mickell showed a decline in his memory performance, which Macciocchi acknowledged may be due to psychiatric problems. A-904. Macciocchi also indicated that some of Mickell's validity results were elevated, but validity testing within the MMPI-II, "scales assessing reliability of responding (VRN/T=43 and TRINF=57) were not elevated." A-901-02. Macciocchi concluded that "there is no current psychometric evidence Mr. Mickell cannot engage in gainful employment "solely from a 'cognitive perspective.'" A-904. However, Macciocchi explained "[w]hether Mr. Mickell's medical problems such as chronic pain or a psychiatric disorder, most likely major depression and panic disorder, would prevent him from working cannot be definitively determined by the current examination." *Id.*

Macciocchi incorrectly asserted that Dr. Todd "reported Mr. Mickell's 'motivation' [effort] [to have been] good, but did not provide test scores supporting optimal effort." A-900. Dr. Todd did provide his test scores:

“[Mickell’s] performance on the forced choice measure and free recall measures were well within normal limits (forced choice = 18/21) and (free recall = 7/21).” A-263. Also, Macciocchi was under the mistaken impression that Mickell was employed at the time of his evaluation. A-897. In fact, when asked what type of employment Mickell could perform, Macciocchi responded that he was already employed and thus, could continue to perform that non-cognitively demanding work. *Id.* Mickell was not employed and had not been for some time. A-256; 221; 1057. Despite his error, Macchiocci still concluded that “there is clinically suggestive evidence [Mickell] may have a major depressive disorder and a panic disorder, which could impair his ability to secure and maintain successful employment.” A-904.

On April 14, 2015, Mickell submitted to an evaluation by an orthopaedist hired by the Plan, George Canizares. A-1252-58. Carizares did not perform any functional ability testing and failed to mention Dr. Litchblau’s FCE test findings in his records review. *See id.* Canizares performed a brief physical examination, noted significant limitations in Mickell’s range of motion due to pain in his neck, lumbar spine, shoulders, lower extremities bilaterally, hips, knees, and ankles bilaterally, and reported that Mickell has a large spur anteriorly at the right MTP joint of the great toe and a deformity of the right fifth digit. A-1255-56. Canizares opined that Mickell suffered from: “Cervical DJD early C4-6 with C5-6 central disc

herniation and C6-7 central disc herniation;” “[l]umbar broad based disc herniation, L4-5 and L5-S1; [b]ilateral shoulder moderate AC joint DJD, status post left shoulder distal clavicle resection with early DJD left shoulder;” “[r]ight hand fifth digit PIP contracture. Range of motion 30-90 degrees;” “[r]ight hip anterior labral tear per MRI;” and “[b]ilateral knee patellofemoral DJD, moderate.” A-1258. Canizares asserted that Mickell was capable of light duty work, if the job permitted “him to alternate sitting and standing and walk short distances.” *Id.*

On April 15, Mickell submitted to an evaluation by a neurologist hired by the Plan, Peter Dunne. A-1224-27. Dunne performed a neurologic examination and a limited records review. A-1226. However, Dunne did not list Dr. Litchblau’s FCE findings as part of that review and did not perform any functional ability testing, such as an FCE. *See id.* Dunne concluded that “neurologically” Mickell was not disabled, but was limited to sedentary activity with no heavy lifting. A- 1225.

Sseparately, Dunne commented about his observations regarding Mickell’s cognitive and psychological state. A-1226. Dunne explained that Mickell is having problems “with memory, losing his way while driving even in familiar locations, losing his train of thought quite frequently, and [he] is distractible. This could be all depression, but also appears to have a cognitive component.” *Id.* Mickell scored below average on the Montreal Cognitive Assessment and Dunne explained

that “his Visuospatial copy of the rectangle is severely abnormal.” A-1239; 1226. Dunne indicated that he agreed with Dr. Todd’s findings of a “a mild cognitive disorder” explaining, “[i]t is hard to tell in this case what is depression and what is possible cognitive damage due to head trauma.” A-1226. Dunne noted that Mickell has a history of concussions in which he was knocked unconscious. A-1230.

Dunne also observed that Mickell “appears depressed though he tries to hide it” and he “began to cry when talking about his limitations and frustrations. He turned away, apologized, and tried to minimize this.” A-1226. Dunne explained that Mickell was sweating throughout the exam, despite being in a cool room, has significant anxiety and severe panic attacks in which he cannot breath, has bouts of severe anger (to the point that he scares his girlfriend), has thoughts of suicide, and has issues with sleeping (which Dunne commented “is hardly conducive to combating depression!”). A-1226-1239. Dunne reported that Mickell was “cooperative and appeared to give a full effort on all testing including the Montreal Cognitive Assessment” and opined that Mickell required “psychological support.” A-1226.

On April 27, 2015, Mickell submitted to neuropsychological testing by an evaluator hired by the Plan, Sutapa Ford. Upon arrival, Ford observed Mickell to be agitated as he asserted that the Plan’s last evaluator “only spent 20 minutes”

with him, he had a headache with a pain level of 6 out of 10, and she described Mickell as “frustrated, agitated, and in pain.” A-1265. Ford indicated that during the testing Mickell’s anxiety was so severe that it made him “nauseous and sick” and thus, he had to take frequent breaks to walk outside. *Id.* At one point during a memory test, Mickell had to walk outside due to his anxiety and could not return for 45 minutes. *Id.* Given the interruption, the test was invalidated. *Id.* Ford noted that “[d]ue to slowed progress on testing” because of Mickell’s pain and anxiety, she discussed completing the testing over a multi-day period, similar to Dr. Todd. *See id.* However, this could not be done because the Plan required Mickell to attend the evaluation in another state and Mickell was unable to change his scheduled airplane flight back to Florida. *Id.* Ford observed that Mickell’s “speech was pressured,” he “occasionally mumbled,” his “[m]ood was depressed,” his “affect was anxious,” and he “displayed mild paranoia.” *Id.* Ford explained that the cognitive testing was consistent with Dr. Todd’s findings. A-1268. The testing revealed impairments in significant areas:

- Working memory: severely impaired on a digit span test and borderline impaired on an arithmetic test A-1270;
- Processing speed: symbol search test: mild impairment; coding test: borderline impairment A-1270;
- Executive functioning tests: borderline impairment A-1271;

- Attention tests: severely impaired; A-1271;
- Logical memory: on one logical memory test, Mickell was moderately impaired and on another, he was mildly impaired. A-1271;
- Non-verbal and recent memory tests: borderline impairment A-1271;
- Language test: profoundly impaired A-1272;
- Categorical fluency test: mildly impaired A-1272;
- Spatial-perceptual reasoning test: severely impaired A-1272;
- Personality and mood tests: severe range A-1272;
- MMPI-II: significant range for emotional / internalization dysfunction, low positive emotions, dysfunctional negative emotions, aberrant emotions, neurologic complaints, head pain complaints, cognitive complaints, suicidal / death ideation, anxiety, stress/ worry, and anger proneness 1272.

Ford noted that Mickell's validity scores were elevated, but opined that based on her "clinical observations and [the] psychometric data, [the elevated scores] may be due to elevated psychiatric distress and pain." A-1268.

Ford asserted that solely "[f]rom a neurocognitive standpoint, there is insufficient evidence supporting the notion that Mr. Mickell is incapable of full-time employment." *Id.* However, Ford specifically explained that "[m]ore significant to [Mickell's] functional capacity" is his "psychiatric dysfunction." *Id.* Ford reported that Mickell's "psychological testing revealed major depression and

significant anxiety.” *Id.* Accordingly, Ford recommended that the Plan have Mickell “undergo a thorough psychiatric assessment which includes validity testing and [a] formal assessment of response biases.” *Id.* The Plan did not heed Ford’s recommendation.

On July 7, 2015, Mickell submitted to an interview by the Plan’s paid psychiatrist, Raymond Faber. Despite Ford’s recommendations, the Plan did not request and Faber did not perform any mental status testing, a comprehensive psychological assessment (Faber did not list any records that he reviewed and he did not interview any third parties), validity testing, or a formal assessment of response biases. A-1346-51. Instead, Faber conducted a short interview of Mickell. *See id.* Faber noted that Mickell explained that he suffered from severe headaches, is extremely forgetful, loses track of what he is saying, cannot remember people he once knew, is depressed and frustrated, scared about his future, experiences uncontrollable bouts of anger, and has frequent and severe panic attacks. A-1348-49. Mickell provided some examples of events that prompted panic attacks including, calling 911 when he thought he had a Q-tip stuck in his ear, kicking down a closet door when he accidentally locked himself in, and a nurse having to hold his hand during an MRI (he could not recall which part of his body was being scanned). A-1348-49. It was also noted that Mickell became

agitated and “raised his voice” when Faber asked about his attorneys’ fees and he could not recall the terms of his fee agreement. A-1349.

Based on this short interview of Mickell, Faber asserted: “Though Mr. Mickell has psychological difficulties which have an effect on his functioning, I do not consider them to rise to a level which precludes some kind of employment,” asserting that Mickell is be able to “assist in [a] sports program for youths.” A-1351.

### **Standard of Review**

This Court reviews a district court's grant of summary judgment to an ERISA defendant *de novo*, applying the same legal standards that governed the district court's decision *See Capone v. Aetna Life Ins. Co.*, 592 F.3d 1189, 1194 (11th Cir. 2010). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Whatley v. CNA Ins. Co.*, F.3d 1310, 1313 (11<sup>th</sup> Cir. 1999). This Court has articulated a six-step analysis for reviewing these decisions:

- (1) Apply the *de novo* standard to determine whether the claim administrator's benefits-denial decision is “wrong” (i.e., the court disagrees with the administrator's decision); if it is not, then end the inquiry and affirm the decision.
- (2) If the administrator's decision in fact is “*de novo* wrong,” then determine whether he was vested with discretion in reviewing claims; if not, end judicial inquiry and reverse the decision.

(3) If the administrator's decision is “*de novo* wrong” and he was vested with discretion in reviewing claims, then determine whether “reasonable” grounds supported it (hence, review his decision under the more deferential arbitrary and capricious standard).

(4) If no reasonable grounds exist, then end the inquiry and reverse the administrator's decision; if reasonable grounds do exist, then determine if he operated under a conflict of interest.

(5) If there is no conflict, then end the inquiry and affirm the decision.

(6) If there is a conflict, the conflict should merely be a factor for the court to take into account when determining whether an administrator's decision was arbitrary and capricious.

*Blankenship v. Metro. Life Ins. Co.*, 644 F.3d 1350, 1355 (11th Cir. 2011).

Review under the arbitrary and capricious standard “is not a rubber stamp and deference need not be abject.” *Hackett v. Xerox Corp. Long-Term Disability Income Plan*, 315 F.3d 771, 774-75 (7th Cir.2003). An arbitrary and capricious review “does not automatically mandate adherence to [an administrator’s] decision,” as “[d]eference is not no review.” *McDonald v. W.-S. Life Ins. Co.*, 347 F.3d 161, 17273 (6th Cir. 2003). In assessing the reasonableness of a claim decision, courts have “an obligation under ERISA” to weigh the “quality and quantity of the medical evidence and the opinions on both sides of the issues. Otherwise, courts would be rendered to nothing more than rubber stamps for any plan administrator's decision.” *See id.*

In order to find that an administrator did not abuse its discretion, a court must review the administrator's decision and find it both "reasoned" and "supported by substantial evidence." *Medina v. Metropolitan Life Ins. Co.*, 588 F.3d 41, 45 (1st Cir.2009). As the Supreme Court explained in *Metropolitan Life Ins. Co. v. Glenn*:

ERISA imposes **higher-than-marketplace quality standards** on insurers.... it simultaneously underscores the particular importance of **accurate claims processing** by insisting that administrators "**provide a 'full and fair review'**" of claim denials...

554 U.S. 105, 115 (2008) (emphasis added). *Glenn's* mandate necessarily requires an ERISA administrator's claim decision be aimed at obtaining an accurate decision and for the administrator to engage in a reasoned analysis of all of the available evidence.

### SUMMARY OF ARGUMENT

When applying a plain reading and giving meaning and effect to every part of the Plan's definition of Disability, the only reasonable interpretation is that a Player is eligible for benefits if he is "substantially prevented from or substantially unable to engage in any occupation or employment for remuneration or profit" that would afford him "up to \$30,000 per year in earned income." To find that the "up to \$30,000 per year in earned income" language contained in the definition only applies to "signing autographs" or the like, as the Plan alleged

in its MJ, would inappropriately add terms to the contract that do not exist.<sup>6</sup> (Doc. 55, p.10). Likewise, to find that "substantially prevented from or substantially unable to engage in any occupation or employment for remuneration or profit" precludes "**any** paid employment," as the District Court found, impermissibly renders meaningless the qualifying language, "up to \$30,000 per year in earned income."<sup>7</sup> (Doc. 60, p.18) (emphasis in original).

The District Court erred in granting the Plan's MJ, where the Plan applied an unreasonable interpretation of the definition of Disability during its claim review, denying Mickell a full and fair review of his claim.

Further, in rendering its benefit decision, the Plan employed its standard practice of "uniformly accept[ing] and rel[ying] on" its evaluators' employability conclusions, to the exclusion of all evidence submitted by Mickell. A-1373 (emphasis supplied). Accordingly, in granting the Plan's MJ, the District Court disregarded both the Department of Labor ERISA claim regulations as well as Eleventh Circuit precedent which require that plan administrators provide each claim with a "full and fair" review, weighing the evidence both for and against a claim for benefits. 29 C.F.R. 2560.503-1, *Oliver*, 497 F.3d at 1199.

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<sup>6</sup> See *Hegel v. First Liberty Ins. Corp.*, 778 F.3d 1214, 1222 (11th Cir. 2015) (explaining that "Courts may not rewrite contracts [or] add meaning that is not present") (internal citations omitted).

<sup>7</sup> See *Trinidad v. Florida Peninsula Ins.*, 121 So.3d 433, 441 (Fla. 2013) (explaining that "an interpretation that renders some language in the policy meaningless should be avoided.").

Finally, the Plan's hired evaluators rendered their employability conclusions in a vacuum, each considering separate and distinct aspects of Mickell's conditions. Thus, the Plan's reflexive deference to its hired evaluators' employability conclusions resulted in a determination that failed to consider the cumulative effect of all of Mickell's conditions on his ability to meet the Disability definition. The District Court erred in granting the Plan's MJ, where the Plan performed a disjointed evaluation of Mickell's co-morbid conditions, stripping him of a full and fair review of his claim.

## **ARGUMENT**

### **A. The Plan Failed to Apply the Plain Reading and Give Effect to Every Part of the Definition of Disability, Failing to Fully and Fairly Review Mickell's Claim.**

In its initial denial letter dated September 27, 2013, the Plan alleged that Mickell's claim was denied because Mickell was "currently employed" and purporting to quote from Section 5.2 of the Plan, asserted that Mickell's employment did not fit into one of the qualifiers to the term "any occupation or employment for remuneration or profit," as Mickell's employment was "not associated with the League or an Employer, personal or family investments, a charitable organization, or out of benevolence." A-112-13. Thus, as the Plan admitted in the initial denial correspondence, Section 5.2 provides numerous qualifications to the term "any occupation or employment for remuneration or

profit,” which explains and limits the meaning. However, in citing to Section 5.2, the Plan neglected to include the final qualification - “receives up to \$30,000 per year in earned income.” A-27. As with the qualifying terms that precede it, “receives up to \$30,000 per year in earned income” limits and explains the term “any occupation or employment for remuneration or profit.” A-27.

In its MJ, the Plan claimed that the “up to \$30,000 in earned income” qualification only applies if a player “earns a modest income from signing autographs” or something similar, despite there being no basis in the Plan or the law for such an “interpretation.” (Doc. 55, p.10). The District Court concluded that “the only reasonable interpretation of the Plan’s disability standard is the interpretation advanced by [the Plan].” (Doc. 60, p.18). Likewise, the District Court concluded that the Plan’s “disability standard is unambiguously based on the ability to engage in *any* paid employment” and that the qualifying language contained in Section 5.2, does not “alter the general [any occupation] standard.” *Id.* The District Court asserted that the Plan’s interpretation was reasonable, as to read the phrase “receives up to \$30,000 per year in earned income” to limit the term “any occupation or employment for remuneration or profit,” would result in “practical problems” for the Plan, because it would:

likely need to weigh the expert opinions of physicians regarding a Player’s physical and/or mental health, it would need to attempt to determine how a Player’s physical and/or mental limitations would impact his ability to engage in specific occupations that pay above the

\$30,000 threshold (as well as presumably take into account regional pay differences).

*Id.* at 18-19.

As this Court explained in *Bradshaw v. Reliance Standard Life Ins. Co.*:

ERISA is silent on matters of contract interpretation or construction. But we are not left without guidance since [c]ourts have the authority to develop a body of federal common law to govern issues in ERISA actions not covered by the act itself. When creating this body of common law, federal courts may look to state law as a model because of the states' greater experience in interpreting insurance contracts and resolving coverage disputes.

707 F. App'x 599, 606–07 (11th Cir. 2017) (internal citations omitted). Further,

... [u]nder Florida law, we must construe insurance contracts “in accordance with the plain language of the policies as bargained for by the parties.” *Auto–Owners Ins. Co. v. Anderson*, 756 So.2d 29, 34 (Fla. 2000). When interpreting insurance contracts, “the language of the policy is the most important factor.” *Taurus Holdings, Inc. v. U.S. Fid. and Guar. Co.*, 913 So.2d 528, 537 (Fla. 2005). The plain meaning of the provision and how an ordinary person would read the provision govern. *See Union Am. Ins. Co. v. Maynard*, 752 So.2d 1266, 1268 (Fla. 4th Dist. Ct. App. 2000).

*Id.* Likewise, “[i]n construing an insurance policy, courts should read the policy as a whole, endeavoring to give every provision its full meaning and operative effect.” *Hepp v. Paul Revere Life Ins. Co.*, 120 F. Supp. 3d 1328, 1340 (M.D. Fla. 2015) *see also*, *Schultz v. Aviall, Inc. Long Term Disability Plan*, 670 F.3d 834, 838 (7th Cir. 2012) (explaining that an ERISA plan “must be read as a whole, considering separate provisions in light of one another and in the context

of the entire agreement." ). Moreover, "an interpretation that renders some of the language in the policy meaningless should be avoided." *Trinidad*, 121 So.3d at 441.

An ordinary person would read the Plan definition of Disability to mean that a Player is Disabled if he is "substantially prevented from or substantially unable to engage in any occupation or employment for remuneration or profit" that would afford him "up to \$30,000 per year in earned income," and not to include the limitation "from signing autographs" or the like.<sup>8</sup> If the Plan desired to limit the earnings qualifier "up to \$30,000 in earned income per year" to "signing autographs" it certainly could have done so. It did not and the Plan and the District Court may not add new terms to the Plan after the fact, disregard other contract language, or apply a strained reading of the contract provisions because it may require the Plan to engage in a more thorough claim investigation. "Courts may not rewrite contracts [or] add meaning that is not present" *Hegel*, 778 F.3d at 1222.

Moreover, the Plan's interpretation fails to consider "the policy as a whole" and "give every provision its full meaning and operative effect." *Hepp*, 120 F. Supp. 3d at 1340. A finding that the Disability standard means that "any paid

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<sup>8</sup> The Plan admitted in its MJ that it reopened Mickell's claim after it received information that he was working in an occupation that did not involve signing autographs, but he was unable to earn up to \$30,000 annually. (Doc.52, p.5).

employment” precludes eligibility for benefits renders the “up to \$30,000 per year in earned income” language contained in Section 5.2 of the Plan meaningless and “should be avoided.” *Trinidad*, 121 S.3d at 441.

"[S]ubstantially prevented from or *substantially* unable to engage in any occupation or employment for remuneration or profit" is not the same as *completely* unable to engage in “*any* paid employment.” A-27 (emphasis supplied); (Doc. 60, p.18). Moreover, earnings qualifiers in disability policies are not unusual. When a disability policy contains an earnings qualifier, plan administrators are required to assess “how a [claimant’s] physical and/or mental limitations would impact [the claimant’s] ability to engage in specific occupations that pay above the [earnings] threshold.”<sup>9</sup> *Id.* at 18-19.

Further, the Plan’s definition of Disability is substantially similar to the SSA’s criteria for Social Security Disability Insurance (“SSDI”) benefits: “unable to engage in any substantial gainful activity....” *Walker v. Bowen*, 826 F.2d 996, 999 (11th Cir. 1987). Similarly, in the SSDI context, the term “substantial gainful

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<sup>9</sup> See *Carty v. Metro. Life Ins. Co.*, No. 3:15-CV-01186, 2019 WL 1058195, at \*10 (M.D. Tenn. Mar. 5, 2019) (explaining that as the definition of disability contained an earnings qualifier, the claimant’s claim “must be considered in light of his symptoms’ bearing on his ability to perform paid labor at the level defined by the plan as distinguishing between disability and non-disability.); *Gordon v. Nw. Airlines, Inc. Long-Term Disability Income Plan*, 606 F. Supp. 2d 1017, 1040 (D. Minn. 2009) (finding that “LINA abused its discretion in failing to apply an eighty percent wage threshold in determining whether Gordon was disabled during the any-occupation period of disability.).

activity” does not mean the complete inability to engage in “any paid employment.” *Green v. Comm’r, Soc. Sec. Admin.*, 555 F. App’x 906, 908 (11th Cir. 2014) (explaining that the SSDI “substantial gainful activity” definition requires an evaluation into a claimant’s ability to earn income above the earnings threshold.). Instead, it is also limited by an earnings cap and thus, does not include work that would afford the claimant the ability to earn income below a certain threshold. The Plan appears to track and consider the SSDI standard.

Also, according to Section 5.2 (b) of the Plan, an award of SSDI benefits during the administrative process is dispositive of a Player’s eligibility for Disability benefits. A-27. Thus, contrary to the Plan and the District Court’s assertions, a Player may be capable of engaging in “paid employment” and be eligible for Disability benefits, as under the SSDI criteria “substantial gainful activity” does not include “paid employment” below a certain threshold and an award of SSDI benefits requires an award of Disability benefits under the Plan.

When reading the policy language as a whole, the only reasonable interpretation is that the term “any occupation or employment for remuneration or profit” is explained and limited by the qualification “up to \$30,000 per year in earned income.” A-27. The District Court erred in granting the Plan’s MJ, where the Plan applied an unreasonable definition of Disability, denying Mickell of a full and fair review of his claim. *See supra*, n.9.

**B. The Plan's Automatic Adoption of Its Hired Evaluators' Employability Conclusions to the Exclusion of All Evidence Submitted by Mickell was an Abuse of Discretion.**

While the Plan was not required to give special deference to Mickell's independent experts' and treating providers' conclusions, the Plan was not free to disregard those opinions. *See Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 834 (2003) (explaining: "Plan administrators ... may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician."); *see Oliver*, 497 F.3d at 1199 (same). In its MJ, the Plan attempted to create the illusion that it did not ignore all evidence submitted by Mickell during its claim review by alleging "[t]he Board had all of Mr. Mickell's submissions before it when it decided his appeal." (Doc. 55, p.3). Having access to the evidence does not remotely answer the question of whether the Plan actually engaged in a "deliberate, principled reasoning process" of the documents and afforded Mickell a full and fair review of his claim. *Glenn v. MetLife*, 461 F.3d 660, 666 (6th Cir. 2006), *aff'd sub nom. Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 128 S. Ct. 2343, 171 L. Ed. 2d 299 (2008). Moreover, the meeting minutes pertaining to the adverse claim decision fail to list any of the records submitted by Mickell that were "before" the board, but do specifically list each of the Plan's evaluators' reports by name. A-1314-15.

Further, the Plan asserted, without support, and the District Court agreed, that it considered Mickell's evidence, but simply credited the evidence of its evaluators over that of Mickell's experts. (Doc. 55, p.3); (Doc. 60, p.25). However, "[a]n ERISA administrator cannot rely on unproven assumptions that are contradicted by the record...."<sup>10</sup> We need to look no further than the Plan's own words in its denial correspondences to reveal that the Plan reflexively deferred to the conclusions of its hired evaluators and at no point during the review process did the Plan ever consider, analyze, dispute, or in large part even mention the evidence submitted by Mickell. A-916-17; 1370-74.

By its own admission, the Plan followed its standard practice of automatically adopting the conclusions of its hired evaluators, without regard to any information submitted by Mickell. A-1373. In its September 8, 2014 denial correspondence, the Plan asserted that it denied Mickell's claim for benefits and the sole rationale cited was its claim that its hired evaluators, Arlosoroff,

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<sup>10</sup> *Nebesny-Fender v. Am. Airlines, Inc.*, 818 F. Supp. 2d 1319, 1332 (S.D. Fla. 2011) (citing to *Majali v. U.S. Dep't of Labor*, 294 Fed.Appx. 562, 563 n.1 (11th Cir.2008) (explaining that the substantial evidence standard is 'more than a scintilla and is such evidence as a reasonable person would accept as adequate to support a conclusion.');

*see Smith v. N.M. Coal 401(K) Personal Sav. Plan*, 334 Fed.Appx. 150, 160 (10th Cir.2009) (refusing to accept the administrator's factual claim where the record contained "no actual proof" to support it.); *Acree v. Hartford Life & Acc. Ins. Co.*, 917 F. Supp. 2d 1296, 1315 (M.D. Ga. 2013) (citing *Nebesny-Fender*, 818 F. Supp. 2d at 1332).

McCasland, and Macciocchi found Mickell “employable.”<sup>11</sup> A-916-17. The Plan made no mention of any evidence submitted by Mickell that it considered in rendering its decision. In its final denial correspondence, the Plan alleged that it reached its adverse benefit determination “despite *potentially*<sup>12</sup> conflicting medical evidence,” again failing to provide any true analysis of or explain its disagreement with the evidence submitted by Mickell. A-1373 (emphasis supplied). Next, the Plan asserted that it was free to discount all evidence submitted by Mickell, in favor of its evaluators’ opinions. *See id.* The Plan first dismissed all of Mickell’s records that do “not directly address the issue of whether [Mickell] is able to work,” in favor of “other evidence that did directly address the issue.” *Id.* The evidence ignored includes Mickell’s MRI reports, x-ray reports, hospital records, injury reports, and physician records. However, the Plan then asserted that “as for the evidence [submitted by Mickell] that did directly address the issue of whether [Mickell] is able to work,” the Plan “had more confidence in the reports of the Plan’s neutral evaluators,” explaining that

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<sup>11</sup> While Macciocchi asserted that from a cognitive perspective he could not conclude Mickell was unemployable, he concluded: “[t]here is clinically suggestive evidence [Mickell] may have a major depressive disorder and a panic disorder, which could impair his ability to secure and maintain successful employment.” A-904.

<sup>12</sup> The use of the word “potentially” establishes that the Plan was not even aware of the substance of records submitted by Mickell.

the Plan “uniformly accept[s] and relie[s] on” its evaluator’s opinions in rendering Disability benefit determinations. *Id.* (emphasis supplied).

In an almost factually identical case, *Dimry v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, it was determined that the Plan abused its discretion in disregarding all evidence submitted by the claimant and automatically adopting the opinions of its evaluators. No. 16-CV-01413-JD, 2018 WL 1258147, at \*4 (N.D. Cal. Mar. 12, 2018). In *Dimry*, just as in the instant matter, the Plan attempted to play lip service to the claimant’s evidence by asserting that there was “*potentially* conflicting medical evidence in the record,” but failed to address or examine the evidence, “did not resolve the conflicts” by analyzing the information, and automatically deferred to the opinions of its hired physicians:

The problem is that the Board denied benefits based upon an unreasonable bias in favor of Plan-selected physicians. Although the Board noted “**potentially conflicting medical evidence** contained in the record,” it did not resolve the conflicts by examining the evidence or delving into the record before it. It simply adopted the opinions of its retained physicians by default. The Board underscored the reflexive and non-discretionary quality of this action by stating that it “**uniformly**” **accepts and relies upon the reports of its retained doctors**. It is true, as the Plan notes, that the Board owed no special deference to the opinions of Dimry’s treating physicians. It was also entitled to treat a single medical opinion as sufficient to adjudicate Dimry’s claim. But it was **not entitled to decide a benefits claim by mere default to a Plan-selected physician**. That is the **abandonment of discretion, not the exercise of it**.<sup>13</sup>

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<sup>13</sup> In another case, *Solomon v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 860 F.3d 259, 265 (4th Cir. 2017), the Plan also argued that it could disregard evidence submitted by the claimant, namely all evidence that post-dated the Inactive A

*Id.* (emphasis supplied) (internal citations omitted). Just as in *Dimry*, in automatically adopting the opinions of its hired evaluators, to the exclusion of all evidence submitted by Mickell, the Plan impermissibly “arbitrarily refuse[d] to credit [Mickell’s] reliable evidence.” *Nord*, 538 U.S. at 834.

Even more egregious than in *Dimry*, in the case at bar, the Plan’s evaluators also failed to consider relevant objective evidence of Disability submitted by Mickell. Not only did the Plan fail to analyze any of the evidence submitted by Mickell in either of its denial correspondences, but not a single evaluator hired and solely relied on by the Plan discussed, disputed, replicated, perform alternative comparable testing to, or even acknowledged that Mickell underwent the objective FCE testing. Thus, the FCE findings provide unrefuted, objective evidence of Mickell’s functional abilities.

The District Court asserted that Canizares “reviewed the FCE and necessarily rejected its conclusions when he found [Mickell] capable of employment.” (Doc. 60, p.23). However, this is decried by Canizares’ own report. Dr. Litchblau performed a three part evaluation which included (1) a medical records review, patient history, and examination, (2) FCE testing and

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Disability benefit fifteen year cut-off date. 860 F.3d 259, 265 (4th Cir. 2017). However, the Fourth Circuit explained that each time the Plan considers an application for benefits, it must consider all of “the facts and circumstances in the administrative record.” *Id.*

conclusions, and (3) an AMA impairment rating. A182-.242. The only reference Canizares made to Dr. Litchblau consisted of a few sentences indicating that Dr. Litchblau summarized Mickell's medical, surgical, and NFL history. A-1257-58. However, Canizares did not mention, analyze, or dispute the objective FCE test results in any way. He did not even acknowledge that an FCE was conducted. *See, Oliver*, 497 F.3d at 1199 (finding that the administrator's hired reviewer unreasonably disregarded objective test results submitted by the claimant where the reviewer acknowledge an electromyography ("EMG") was conducted, but failed to assert that it was invalid and also neglected to acknowledge that another EMG was conducted). There is no evidence in the record that Canizares actually reviewed or considered the objective FCE test results when rendering his opinion, as he entirely failed to mention its existence.

Similarly, Canizares simply did not "refute" the FCE findings, as he did not explain his disagreement with the testing, provide an analysis as to why the testing was invalid, or even acknowledge that the objective FCE was performed. *See id.* Again, "[a]n ERISA administrator cannot rely on unproven assumptions that are contradicted by the record...." *Nebesny-Fender*, 818 F. Supp. 2d at 1332.

As the courts have recognized, "the best means of assessing an individual's functional level" is an FCE. *Lake v. Hartford Life and Acc. Ins. Co.*, 320

F.Supp.2d 1240, 1249 (M.D. Fla. 2004).<sup>14</sup> While Mickell does not claim that the FCE is dispositive of his Disability, it is credible, objective evidence of his functional abilities, the only of its kind in the record, and it should have been considered by the Plan and its evaluators in rendering their conclusions.

Additionally, the Plan failed to explain its disagreement with the psychological assessment and testing performed by Peggy Vermont and none of the Plan's evaluators reviewed or considered the information. The Plan's evaluator, Ford, explained that "[m]ore significant to [Mickell's] functional capacity" is his "psychiatric dysfunction" and that Mickell's "psychological testing revealed major depression and significant anxiety." A-1268. Accordingly, Ford recommended that the Plan have "Mickell undergo a thorough psychiatric assessment, including validity testing and [a] formal assessment of response biases." *Id.* Rather than heed Ford's recommendation, the Plan simply had Faber perform an interview of Mickell, without any of the testing suggested or even a records review. A-1346-51. While the Plan failed to obtain the relevant information, Peggy Vermont did, finding that "[d]ue the severity of his mood and

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<sup>14</sup> See also, *Townsend v. Delta Family-Care Disab. and Surv. Plan*, 295 Fed.Appx. 971, 977 (11th Cir. 2008) (recognizing that ERISA administrators in disability claims "routinely rely on FCEs."); *Gannon v. Metro. Life Ins. Co.*, 360 F.3d 211, 213 (1st Cir.2004) (concluding that it was reasonable for a plan administrator to rely upon an FCE); *Jackson v. Metro. Life Ins. Co.*, 303 F.3d 884, 888 (8th Cir.2002) (noting that an FCE's findings regarding the claimant's work capacity was enough to constitute substantial evidence).

anxiety symptoms, Mr. Mickell is not deemed employable at this time.” A-1341. Not only did the Plan fail to explain its disagreement with Ms. Vermont’s findings, but it either did not provide the report to Faber or he ignored it, as he failed to list or discuss a single record considered in rendering his opinion. A-1346-51.

Contrary to the Plan’s allegation in its MJ, Mickell does not claim that a “point-by-point rebuttal of the evidence” is required. (Doc. 55, p.4). However, under the circumstances of this case, a fair consideration and analysis of the evidence submitted was necessary. Again there is no comparable testing to the FCE in the record. The objective FCE findings certainly could have changed the Plan’s evaluators’ opinions. However, at the very least, it was incumbent on the Plan and its evaluators to explain how the FCE – a credible objective measure of functional ability – was inadequate, unreliable, or invalid.<sup>15</sup> Similarly, if the testing

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<sup>15</sup> See *Helton v. AT & T Inc.*, 709 F.3d 343, 359 (4th Cir. 2013) (explaining that “[w]hile an administrator has the authority to weigh conflicting pieces of evidence, it abuses its discretion when it fails to address conflicting evidence.”); *Love v. Nat'l City Corp. Welfare Benefits Plan*, 574 F.3d 392, 397–98 (7th Cir. 2009) (finding that the administrator acted arbitrarily and capriciously where “[t]he Plan did not explain why it chose to discount the near-unanimous opinions of Love's treating physicians” and explaining that “[w]hile plan administrators do not owe any special deference to the opinions of treating physicians, they may not simply ignore their medical conclusions or dismiss those conclusions without explanation.”); *Halpin v. W.W. Grainger, Inc.*, 962 F.2d 685, 695 (7th Cir. 1992) (explaining “within reasonable limits, the reasons for rejecting evidence must be articulated if there is to be meaningful appellate review.”); *Neubert v. Life Ins. Co. of N. Am.*, No. 5:10CV1972, 2012 WL 776992, at \*13 (N.D. Ohio Mar. 8, 2012) (explaining that administrators are “obliged to provide some explanation for adopting his opinion over those of [] treating physicians.”).

recommended by Ford and performed by Ms. Vermont was considered by Faber, it may have altered his opinion. However, at the very least, the Plan and Faber should have analyzed Ms. Vermont's findings and under the circumstances of this case, explained their disagreement with the test results and conclusions. *See supra*, n.15.

The Eleventh Circuit's decision in *Oliver* is instructive. In *Oliver*, it was found that the administrator acted unreasonably in failing to fairly consider the claimant's evidence, citing the denial letter as proof:

Coca-Cola's denial letter to Oliver includes an itemized list of the materials Coca-Cola reviewed in deciding Oliver's claim. Though the list includes the MRI test, which did not provide conclusive support for Oliver's disability claim, conspicuously absent from the list are the two EMG tests and the nerve conduction test that Oliver's physician's relied on as clinical objective evidence of Oliver's chronic radiculopathy, and that Coca-Cola's peer review doctors did not dispute. The letter contains a discussion of some of the medical evidence provided by Oliver, and addresses the MRI, which though itself was inconclusive, did not contradict the results of the EMGs and nerve conduction test. However, the letter simply notes that the MRI did not support a finding of disability, and omits any discussion of the EMGs, nerve conduction test, and other evidence Oliver submitted that supported a finding of disability....

Though courts may not impose on plan administrators a discrete burden of explanation when they credit reliable evidence that conflicts with a treating physician's evaluation, plan administrators may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician. Here, Oliver presented Broadspire and Coca-Cola with a plethora of medical evidence in support of his disability claim. Coca-Cola denied Oliver's claim not on the basis of conflicting, reliable evidence—a practice we have upheld—rather, it

simply ignored relevant medical evidence in order to arrive at the conclusion it desired.

497 F.3d at 1199. Similar to *Oliver*, the Plan did not choose to credit reliable, conflicting evidence that was comparable to Dr. Litchblau's FCE findings (none was obtained by the Plan) or Peggy Vermont's testing (none was ordered or performed). Neither did the Plan choose to credit conflicting evidence over the opinions of Dr. Todd and Ms. Gonzalez, nor the abundance of information contained in the medical and diagnostic records Mickell provided. There was no consideration or analysis of Mickell's evidence by the Plan. The Plan simply ignored all records submitted by Mickell and reflexively deferred to the employability conclusions of its hired evaluators. The District Court erred in granting the Plan's MJ, where the Plan automatically adopted the employability conclusions of its hired evaluators, to the exclusion of all evidence submitted by Mickell, denying Mickell a full and fair review of his Disability claim.<sup>16</sup>

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<sup>16</sup> See *id.*; *Majeski v. Metro. Life Ins. Co.*, 590 F.3d 478, 483 (7th Cir. 2009) (finding it arbitrary and capricious "for a plan administrator [to] simply ignore a treating physician's medical conclusion and to dismiss [other] conclusions without explanation" and to base its decision solely on its expert's report, who did "not acknowledge, must less analyze, the significant evidence of functional limitations."); *Madison v. Greater Georgia Life Ins. Co.*, 225 F.Supp.3d 1381, 1399 (N.D.Ga. 2016) (holding that "GGL could have used one hundred reviewers, but if they all failed to consider all record evidence, they engaged in unreasoned decisionmaking.").

**C. In Failing to Consider the Cumulative Effect of All of Mickell's Conditions on His Ability to Meet the Definition of Disability, the Plan Abused Its Discretion.**

The prejudice of automatically deferring to its hired evaluators' employability conclusions was compounded in Mickell's case, as it resulted in a disjointed evaluation of his co-morbid conditions. At no point in the claim process did the Plan or its evaluators consider the cumulative effect of all of Mickell's conditions and symptoms on his functional abilities. As the Plan admitted in its MJ and the court agreed, the Plan's hired evaluators restricted their employability conclusions to separate and distinct aspects of Mickell's condition. (Doc. 55, p.5); (Doc. 60, p.21). Moreover, it is clear from the evaluators' reports that they considered Mickell's co-morbid conditions in silos:

- Arlosoroff did not review any of Mickell's records and based his conclusion on his physical examination. A-1274-79;
- Canizares only discussed and considered Mickell's physical conditions. A-1252-58;
- McCasland limited his employability conclusion solely to a "neurological standpoint." A-887;
- Macciocchi limited his employability conclusion to "a cognitive perspective" and specifically explained: "[w]hether Mr. Mickell's

medical problems such as chronic pain or a psychiatric disorder, most likely major depression and panic disorder, would prevent him from working cannot be definitively determined by the current examination.” A-904. Though he commented “[t]here is clinically suggestive evidence he may have a major depressive disorder and a panic disorder, which could impair his ability to secure and maintain successful employment.” *Id.*

- Dunne limited his employability conclusion to his “neurologic[]” examination. A-1226;
- Ford limited her employability conclusion to “a neurocognitive standpoint,” but went on to comment “[m]ore significant to [Mr. Mickell’s] functional capacity” is his “psychiatric dysfunction” and thus, recommended that Defendant have “Mr. Mickell undergo a thorough psychiatric assessment which includes validity testing and [a] formal assessment of response biases.” A-1268; and
- Faber limited his employability conclusion to his psychological interview of Mickell, without considering any records. A-1346-51.

As the Plan followed its standard practice of automatically adopting the employability conclusions of its hired evaluators, to the exclusion of all evidence submitted by Mickell, at no point in the claim review process did the Plan consider

the combined effect of Mickell's co-morbid conditions on his ability to meet the definition of Disability.

Both Dr. Litchblau and Dr. Todd took into consideration the collective influence of Mickell's conditions in determining that he was unable to maintain employment, but this information was reflexively dismissed by the Plan in favor of employability conclusions of its evaluators who considered Mickell's conditions in silos. A-225; 266.

A full and fair review of a benefit claim requires administrators to consider the collective effect of all conditions and symptoms on a claimant's functionality.<sup>17</sup> The prejudicial effect of considering co-morbid conditions in isolation was discussed in *Maiden v. Aetna Life Ins. Co.*:

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<sup>17</sup> See *Duperry v. Life Ins. Co. Of N. Am.*, 632 F.3d 860, 873 (4th Cir. 2011) (finding that an insurer must consider all evidence together); *Guthrie v. Nat'l Rural Elec. Coop. Ass'n Long-Term Disability Plan*, 509 F.3d 644, 652 (4th Cir. 2007) (finding that an insurer must consider all evidence in conjunction with each other, thus plaintiff was denied a full and fair review when they honed in on her pulmonary issues without considering her other ailments to deny her benefits); *Kalish v. Liberty Mut./Liberty Life Assur. Co. of Boston*, 419 F.3d 501, 510 (6th Cir. 2005) (calling into question the defendants' reliance on a physician's report that ignores the "interrelated effects" of the plaintiff's heart condition and depression to deny benefits); *Leger v. Tribune Co. Long Term Disability Ben. Plan*, 557 F.3d 823, 835 (7th Cir. 2009) (explaining that the Plan acted in an arbitrary and capricious manner in terminating the plaintiff's benefits without considering her complete medical history); *Torres v. UNUM Life Ins. Co. of Am.*, 405 F.3d 670 (8th Cir. 2005) (explaining that plan administrators must consider the effects of all impairments to make claim determinations); See also, *Green v. Sun Life Assur. Co. of Canada*, 259 Fed. Appx. 42, 44 (9th Cir. 2007) (finding that the plaintiff was disabled through a combination of his vertigo and orthopedic problems); *Abram v. Cargill, Inc.*, 395 F.3d 882, 887–88 (8th Cir. 2005) (providing: "[t]he Plan is not free to ignore evidence of [a] second, potentially disabling condition.).

While Aetna said it reviewed Maiden's claim for both a physical and mental health impairment," the record shows that Aetna assessed Maiden's ability to work in silos, considering whether Maiden's back pain rendered him disabled under the plan separate and apart from whether psychological problems did. Aetna's approach is most obvious in the reports drafted by Aetna's reviewers during Maiden's internal appeal.... Whether Maiden's health concerns satisfy the plan's definition of "disability" or not, they are comprised at a minimum of back pain and psychological impairments, and nothing in the plan justified Aetna's consideration of these co-morbidities in isolation. Aetna should have reviewed the compound effect of Maiden's physical impairments and his psychiatric issues, and its failure to do so was an arbitrary and capricious exercise of Aetna's discretion.

No. 3:14-CV-901, 2016 WL 81489 (N.D. Ind. Jan. 6, 2016). Just as in *Maiden*, the Plan and its reviewers unreasonably assessed each of Mickell's conditions in a silo, failing to consider the cumulative effect of his physical, cognitive, and psychological symptoms on his functionality.

Failing to consider the totality of Mickell's conditions on his ability to meet the definition of Disability, negatively impacted the claim decision. For example, the Plan automatically adopted Ford's conclusion that based on the limited area she was asked to assess, she could not opine that Mickell was unemployable. A-1268. However, the Plan ignored Ford's qualification that "[m]ore significant to [to Mickell's] functional capacity" is his "psychiatric dysfunction," recommending a comprehensive psychiatric assessment with additional testing. *Id.* The Plan then sent Mickell for an interview with Faber, failed to obtain the testing recommended by Ford, and reflectively deferred to Faber's employability assessment, which was made without considering any of Mickell's medical, cognitive, or psychological

evidence. Faber concluded: “Though Mr. Mickell has psychological difficulties which have an effect on his functioning, I do not consider them to rise to a level which precludes some kind of employment,” alleging that Mickell could “assist in [a] sports program for youths.” A-1347; 1351.

In automatically deferring to Faber’s employability conclusion, the Plan failed to consider whether Faber’s conclusions were plausible given the totality of the available physical, cognitive, and psychological evidence. Putting aside all evidence submitted by Mickell, the Plan failed to consider whether Mickell could actually assist in a sports program for minors given the fact that the Plan’s other evaluators opined that Mickell was unable to engage in repetitive kneeling, squatting, and climbing, he has to “alternate sitting and standing and walk short distances;” and as Dunne concluded, Mickell is limited to sedentary activity. A-1279; 1225; 1258. Further, assuming *arguendo* that Mickell had the physical ability to “assist in a sports program for youth,” the Plan failed to contemplate whether given his severe depression, uncontrolled bouts of anger, paranoia, emotional dysregulation, major depression, suicidal ideation, thoughts of harming others, memory impairments, and severe anxiety and panic attacks (all of which several of the Plan’s own evaluators objectively observed) Mickell would be able to safely assist in a sports program for children. Finally, the Plan never considered whether the combination of Mickell’s physical, cognitive,

and psychological symptoms would prevent him from performing the required duties of an occupation assisting in a sports program for children or any other occupation.

The District Court erred in granting the Plan's MJ, where the Plan failed to conduct a reasoned and principled review of the evidence and consider Mickell's condition as a whole when it rendered its benefit determination, stripping Mickell of a full and fair review of his claim.

### **CONCLUSION**

For the reasons set forth above, appellant, Darren Mickell, prays that this Court reverse the District Court's judgment and grant his claim for benefits.

Respectfully Submitted,

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**CERTIFICATE OF COMPLIANCE**

I certify pursuant to Federal Rule of Appellate Procedure 32 (g) and Eleventh Circuit Rule 27(d) that this motion is reproduced using Times New Roman 14-point type, uses a proportionately spaced typeface and contains 12,985 words, including headings, quotations, and footnotes.

Dated May 6, 2019

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on May 6, 2019, we electronically filed the foregoing Plaintiff-Appellant's Brief with the Clerk of the Court using the ECF system, which will automatically generate and send by e-mail a Notice of Docket Entry constituting service on the following: Michael Junk, Esquire, Groom Law Firm, 1701 Pennsylvania Avenue, NW, Suite 1200, Washington, DC 20006 and Brian D. Equi, Esquire, Goldberg Segalla 800 North Magnolia Avenue, Suite 1201, Orlando, Florida, 32803.

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